

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. § 6001 et seq.

Re: Stokes Communications Corp.,  
Land Use Permit #3R0703-EB  
(Amendment Application Revocation)

MEMORANDUM OF DECISION

This decision pertains to a motion to enforce an existing revocation order which, in relevant part, seeks revocation of Land Use Permit #3R0703-EB ("Permit").

The Permit, originally issued by the District #3 Environmental Commission ("District Commission") on August 25, 1992, authorizes Stokes Communications Corporation ("Stokes") and Idora Tucker ("Tucker") to replace a 120-foot broadcasting and communications tower with a 300-foot tower ("Project"). On December 13, 1993, the Environmental Board ("Board") found that Stokes and Tucker had violated the Permit and gave them the opportunity to cure the violation and, thereby, retain the Permit.

As explained below, the Board concludes that, over time, the requirement Stokes and Tucker had to satisfy in order to cure the violation became unclear. Consequently, the Board denies the motion to enforce.'

I. BACKGROUND

On August 25, 1992, the District Commission issued the Permit to Stokes and Tucker authorizing the Project on lands owned by Tucker in Randolph, Vermont ("Site"). On September 22, 1992, Pierre LaFrance, Richard Theken, Bryant Smith, Elizabeth LaFrance and Joan Sax ("Petitioners") appealed the Permit to the Board.

In January, 1993, Stokes began construction at the Site while the appeal was pending, and the Petitioners requested a stay which the Board denied. On March 3, 1993, the Petitioners filed a petition to revoke the Permit alleging that Stokes had violated it by making changes to the Project

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<sup>1</sup> In a brief Memorandum to Parties dated January 10, 1996, Board Chair John T. Ewing informed the parties that the Board "will not revoke Land Use Permit #3R0703-EB for failure to file a timely and complete permit amendment application with the District #3 Environmental Commission." In this Memorandum of Decision, the Board formally issues its decision.

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without the approval of the District Commission. On April 5, 1993, the Board consolidated the appeal and the revocation petition.

On December 13, 1993, the Board issued a decision in which it concluded in relevant part:

1. Stokes has not complied with, and is therefore in violation of, Land Use Permit #3R0703 by making changes to the project prior to approval from the District Commission. This permit will be revoked unless the following corrective measures are taken:

On or before January 26, 1994, Stokes and Contel, as co-applicants, shall file an application for an amendment to the permit to authorize i) the new location of the tower; ii) the actual size of the tower's cross-section; iii) the Contel building and concrete foundation at the tower site; iv) the concrete pad for a back-up generator; v) the ice bridge; vi) the chain link fence; and vii) all antennas, radomes, mounting arms, and any other structures or appurtenances that are now or in the future will be attached to the tower. Stokes shall diligently pursue the amendment application and shall respond to requests from the District Commission for additional information within two weeks of such requests.

Re: Stokes Communications Corp., #3R0703-EB, Appeal and Revocation, Findings of Fact, Conclusions of Law, and Order at 19 (December 13, 1993) (emphasis original).<sup>2</sup>

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<sup>2</sup> Condition 2 of the Permit provides in part: "On or before February 18, 1994, the Permittees shall install devices on the lights of the tower to shield them, in accordance with the Permittees' proposal described in Findings of Fact and Conclusions of Law #3R0703-EB." Unless otherwise noted herein, this decision does not address the light shield condition because compliance with that condition is the subject of a separate revocation proceeding -- Re: Stokes Communications Corp., #3R0703-EB (Light Shield Revocation).

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On April 8, 1994, Stokes and Tucker appealed the Board's December 13, 1993 decision to the Vermont Supreme Court challenging, inter alia, the Board's scheduling requirements. Additionally, Stokes and Tucker filed a motion for stay of the Board's December 13, 1993 decision pending the appeal. On June 1, 1994, the Board granted a stay pending the Supreme Court's decision in the appeal ("Board Stay"). On July 21, 1995, the Supreme Court affirmed the Board's December 13, 1993 decision. In re Stokes Communications Corporation, 6 Vt. Law Week 210 (1995).

On August 7, 1995, the Board received a letter, dated July 29, 1995, from Richard Theken and Pierre LaFrance which stated in part:

The original Board decision in this case which occurred December 13, 1995 [sic] required the applicants to file for an amended permit by January 26, 1994.

The Vermont Supreme Court affirmed the Board decision on July 21, 1995. We would appreciate receiving confirmation from the Board that the new amended permit date is September 4, 1995. We would also appreciate your sending a response to our inquiry to the District Commission.

On August 8, 1995, Acting Chair Arthur Gibb sent a memorandum to the parties which stated in part:

On July 21, 1995, the Vermont Supreme Court issued its decision in the appeal of Re: Stokes Communication Corp. and Idora Tucker, #3R0703-EB, Findings of Fact, Conclusions of Law and Order (December 13, 1993) (the "Decision").

On August 7, 1995, appellants Richard Theken and Pierre LaFrance (the "Appellants") filed a letter with the Board relative to the Decision.

All parties shall respond to the Appellants' August 7, 1995, letter on or before August 25, 1995.

: (Emphasis **original**).<sup>3</sup>

On August 24, 1995, Stokes responded to the **Theken** and **LaFrance** letter as follows in part:

The Board should now set a new schedule for filing the amendment application and for installing the shields.

I would suggest that a deadline of October 1, 1995 is reasonable for filing the amendment application with the District Commission. ...

On August 28, 1995, the Petitioners responded to Stokes' letter with a letter which stated in part:

The new application must be filed within the time frame outlined in the Board's order and the light shields must be installed within the-sixty day time frame approved and affirmed by the Supreme Court.

On August 30, 1995, Stokes submitted another letter to the Board proposing a new schedule for installing the light shields.

On September 13, 1995, the Board deliberated on the amendment application deadline. On September 29, 1995, the Board issued a Memorandum of Decision in which it concluded that:

On July 21, 1995, the stay dissolved according to its own terms, and jurisdiction vested with the District #3 Environmental Commission pursuant to the [December 13, 1993] Decision. The Board notes that the Permittees' obligation to promptly and completely comply with the ... [December 13, 1993] decision, according to its self-evident deadlines, is final ....

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<sup>3</sup> John T. Ewing became Board Chair effective February 1, 1995. Pursuant to Chair Ewing's request, Arthur Gibb served as Acting Chair in this matter until **November 29, 1995**. Thereafter, Mr. Ewing has served as Chair in this matter.

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Re: Stokes Communications Corp. and Idora Tucker, #3R0703-EB, Memorandum of Decision at 3 (September 29, 1995).

On October 11, 1995, the Petitioners filed a petition to revoke the Permit on the grounds, in relevant part, that Stokes had failed to file an amendment application with the District Commission in accordance with the Board's December 13, 1993 decision. On November 1, 1995, the Petitioners filed a motion to rename their petition to revoke requesting that it be referred to as a motion to enforce existing revocation order ("Motion to **Enforce**").

On November 6, 1995, Stokes and Bell Atlantic Nynex Mobile ("**BANM**") filed an amendment application with the District Commission that was deemed incomplete on November 9, 1995.<sup>4</sup>

On December 6, 1995, the Board issued a Memorandum of Decision granting the motion to rename and addressing the issue of deadlines. The Board stated in part:

The Decision was issued on December 13, 1993. Stokes had 44 days to cure the violation with an amendment application and 67 days to install the light shields. The Board has not altered these time frames. However, the Board stayed the Decision pending resolution by the Supreme Court. The Supreme Court affirmed the Board on July 21, 1995. 44 days from July 21, 1995 is September 4, 1995. 67 days from July 21, 1995 is September 26, 1995.

Re: Stokes Communications Corp., #3R0703-EB, (Revocation) Memorandum of Decision at 3 (December 6, 1995).

On December 15, 1995, Stokes and BANM filed a complete amendment application with the District Commission.

The **Board convened** a public hearing on December 20, 1995, in accordance with 3 V.S.A. § 814(c), to give Stokes an opportunity to show compliance with all lawful

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<sup>4</sup> BANM now holds a leasehold interest in the Project similar in nature to that which Contel Cellular Inc. ("**Contel**") owned when the Board directed Contel to participate as a co-applicant in the amendment application ordered by the Board.

requirements for retention of the Permit. At the hearing, Stokes did not dispute the deadlines set forth in the December 6, 1995 Memorandum of Decision -- 44 days to file a complete amendment application and 67 days to install the light shields. Instead, Stokes argued that the Board had not made the deadlines clear until December 6, 1995.

The Board deliberated immediately after the December 20, 1995 hearing but did not reach a decision. The Board deliberated again on January 9, 1996 by teleconference and decided that it would not revoke the Permit for failure to file a timely and complete amendment application with the District Commission. On January 10, 1996, Chair Ewing issued a Memorandum to Parties informing them that the Board had decided not to revoke the Permit and that a detailed decision would be issued later. On February 28, 1996, the Board deliberated on this Memorandum of Decision.

## II. ISSUES

1. What were the lawful requirements for retention of the Permit?
2. Did Stokes and Tucker have notice of the lawful requirements for the retention of the Permit?
3. If Stokes and Tucker had notice of the lawful requirements for the retention of Permit, did Stokes show compliance with the lawful requirements?

## III. FINDINGS OF FACT

1. The Permit authorized Stokes and Tucker to replace a 120-foot broadcasting and communications tower with a 300-foot tower.
2. On December 13, 1993, the Board found that Stokes had violated the Permit.
3. On December 13, 1993, the Board advised Stokes and Tucker that the Permit would be revoked unless Stokes and Contel filed a complete amendment application with the District Commission on or before January 26, 1994.
4. On April 8, 1994, Stokes and Tucker appealed the Board's December 13, 1993 decision to the Vermont Supreme Court.

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5. On June 1, 1994, the Board issued the Board Stay.

6. The Board Stay did not indicate what affect, if any, it would have upon the amendment application deadline.

7. On July 21, 1995, the Supreme Court affirmed the Board's December 13, 1993 decision.

8. The Supreme Court did not indicate what affect, if **any**, its decision would have upon the amendment application deadline.

9. On August 7, 1995, the Board received a letter from Richard **Theken** and Pierre **LaFrance** requesting confirmation that the amendment application deadline was September 4, 1995 -- 44 days after the Supreme Court's July 21, 1995 decision.

10. On August 8, 1995, Acting Chair Gibb sent a memorandum to the parties asking them to respond to the **Theken** and **LeFrance** letter.

11. In an August 24, 1995 letter to Acting Chair Gibb, Stokes suggested that the amendment application deadline should be October 1, 1995.

12. On August 29, 1995, the Board received a letter from the Petitioners urging that the amendment application must be filed within the time frame outlined in the Board's December 13, 1993 decision.

13. On September 13, 1995, the Board deliberated on the amendment application deadline.

14. On September 29, 1995, the Board issued a Memorandum of Decision concluding that the obligation of Stokes and Contel to promptly and completely comply with the December 13, 1993 Board decision, according to its self-evident deadlines, was final.

15. The Board did not state what the **"self-evident"** deadlines were.

16. On December 6, 1995, the Board clearly set forth, for the first time since issuing the Board Stay, the amendment application deadline --

September 4, 1995 -- 44 days after the Supreme Court's July 21, 1995 decision.

17. On December 15, 1995, Stokes and **BANM (Contel's** successor) filed a complete amendment application with the District Commission.

#### IV. CONCLUSION

The Board may revoke a permit pursuant to 10 V.S.A. § 6090(c) which states:

A permit may be revoked by the board in the event of violation of any conditions attached to the permit **or** the terms of any application, or violation of any rules of the board.

Environmental Board Rule ("**EBR**") 38(A)(2) provides the grounds for revocation:

The board may after hearing revoke a permit if it finds that: (a) The applicant or representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or (b) the applicant or successor in interest has violated the terms of the permit or any permit condition, the approved terms of the application, or the rules of the board; or (c) the applicant or successor in interest has failed to file an affidavit of compliance with respect to specific conditions of the permit, contrary to a request by the board or district commission.

(Emphasis added).

Before revoking a permit, the Board must comply with the following provision of the Vermont Administrative Procedures Act ("**APA**"):

No revocation of any license is lawful unless, prior to the institution of agency proceedings, the agency gave **notice** by mail to the licensee of facts or conduct **which** warrant the intended



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action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.

3 V.S.A. § 814(c) (Supp. 1995).

1. Lawful Requirement

As set forth in the Board's December 6, 1995 Memorandum of Decision, the lawful requirement for retention of the Permit was: filing an amendment application by September 4, 1995 (44 days after the Supreme Court's July 21, 1995 decision -- a period of time equal to that which the Board originally afforded Stokes, Tucker and Contel to make such a filing after the Board's December 13, 1993 decision).

2. Notice of Lawful Requirement

The impact of a revocation order upon a permittee can be significant. Generally, the Board is reluctant to revoke a Land Use Permit. If, upon review, the Board finds that the requirements for lawful retention of a permit are unclear, the Board will typically exercise the substantial discretion afforded it under EBR 38 and the APA and not revoke the permit in question.

Upon review of the correspondence and other documents filed with the Board in this case, the Board concludes that, over time, the requirement Stokes and Tucker had to satisfy in order to cure the violation and, thereby, retain the Permit became unclear. This requirement remained unclear until the Board issued its December 6, 1995 Memorandum of **Decision.**<sup>5</sup> Consequently, the Board cannot find that Stokes and Tucker had adequate notice of the lawful requirement for retention of the Permit -- filing a complete amendment **application** with the District Commission by September 4, 1995.<sup>6</sup> In the absence of such notice, the Board will not

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<sup>5</sup> Stokes and BANM filed a complete amendment application just nine days later -- December 15, 1995.

<sup>6</sup> This conclusion has no bearing on the issues of if and when Stokes had notice of the Condition #2 of the Permit -- installation of light shields. However, there can be no doubt that Stokes knew of and understood the 67 day light shield installation condition, at the latest, as of December 6, 1995.

revoke the Permit.

The Board reaches the above conclusion with considerable **reluctance**.<sup>7</sup> Although the Board will not revoke the Permit at this time, it has determined that this matter warrants initiation and pursuit of an enforcement action.

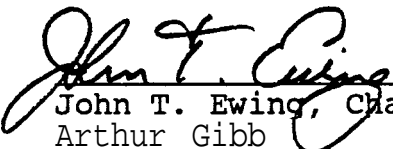
**V. ORDER**

1. The Petitioners' Motion to Enforce Existing Revocation Order, as it relates to compliance with the Board's December 13, 1993 amendment application requirement, is **DENIED**.

2. For purposes of appeal, motions to alter and/or other post decision filings, the date of the Board's final order regarding the Petitioners' Motion to Enforce Existing Revocation Order, as it relates to compliance with the Board's December 13, 1993 amendment application requirement, shall be the date of this Memorandum of Decision.

Dated at Montpelier, Vermont, this 20th day of March, 1996.

ENVIRONMENTAL BOARD

  
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John T. Ewing, Chair  
Arthur Gibb  
Samuel Lloyd  
William Martinez  
Rebecca M. Nawrath  
Robert G. Page

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<sup>7</sup> Because Stokes did not have adequate notice of the September 4, 1995 amendment application deadline, this decision does not discuss whether Stokes complied with such deadline.

DISSENT

The December 13, 1993 Board decision set specific dates for compliance to avoid permit revocation. An amendment application was to be filed by January 26, 1994 -- 44 days after the date of the December 13, 1993 decision. The compliance date was stayed by the Board pending the outcome of the Stokes/Tucker appeal of the December 13, 1993 decision to the Vermont Supreme Court. The stay dissolved on issuance of the Supreme Court decision -- July 21, 1995. The compliance date then became September 4, 1995 -- 44 days from the issuance of the Supreme Court's decision.

The compliance date of September 4, 1995 was noticed to the parties by the letter from petitioners Richard **Theken** and Pierre **LaFrance** dated July 29, 1995 and filed with the Board on August 7, 1995. On September 29, 1995, the Board issued a decision referring to the compliance dates as "self-evident" and denying the "parties respective requests to clarify or extend compliance **dates.**" Re: Stokes Communications Corp. and Idora Tucker, #3R0703-EB, Memorandum of Decision at 3 (September 29, 1995). The September 4, 1995 compliance date was further confirmed in the December 6, 1995 Board decision. Re: Stokes Communications Corp., #3R0703-EB, Appeal and Revocation, Memorandum of Decision (December 6, 1995).

The Board has been consistent in its interpretation of the compliance date and has denied requests to change or extend the compliance date. Stokes, Tucker and Contel did **not** file a complete amendment application until December 15, 1995 -- more than three months after the compliance date.

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We believe Stokes and Tucker had adequate notice of the September 4, 1995 compliance date and the consequences for failure to comply with it. Stokes and Tucker were given an opportunity to demonstrate compliance with the requirements of the December 13, 1993 decision at a public hearing on December 20, 1995 and failed to do so. Therefore, the Permit should be revoked.

Dated at Burlington ont, this 20th day of  
March, 1996.

DISSENTING BOARD MEMBER

Marcy Harding  
Marcy Harding

Dated at Montpelier t, this 20th day of  
March, 1996.

DISSENTING BOARD MEMBER

Steve E. Wright  
Steve Wright

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